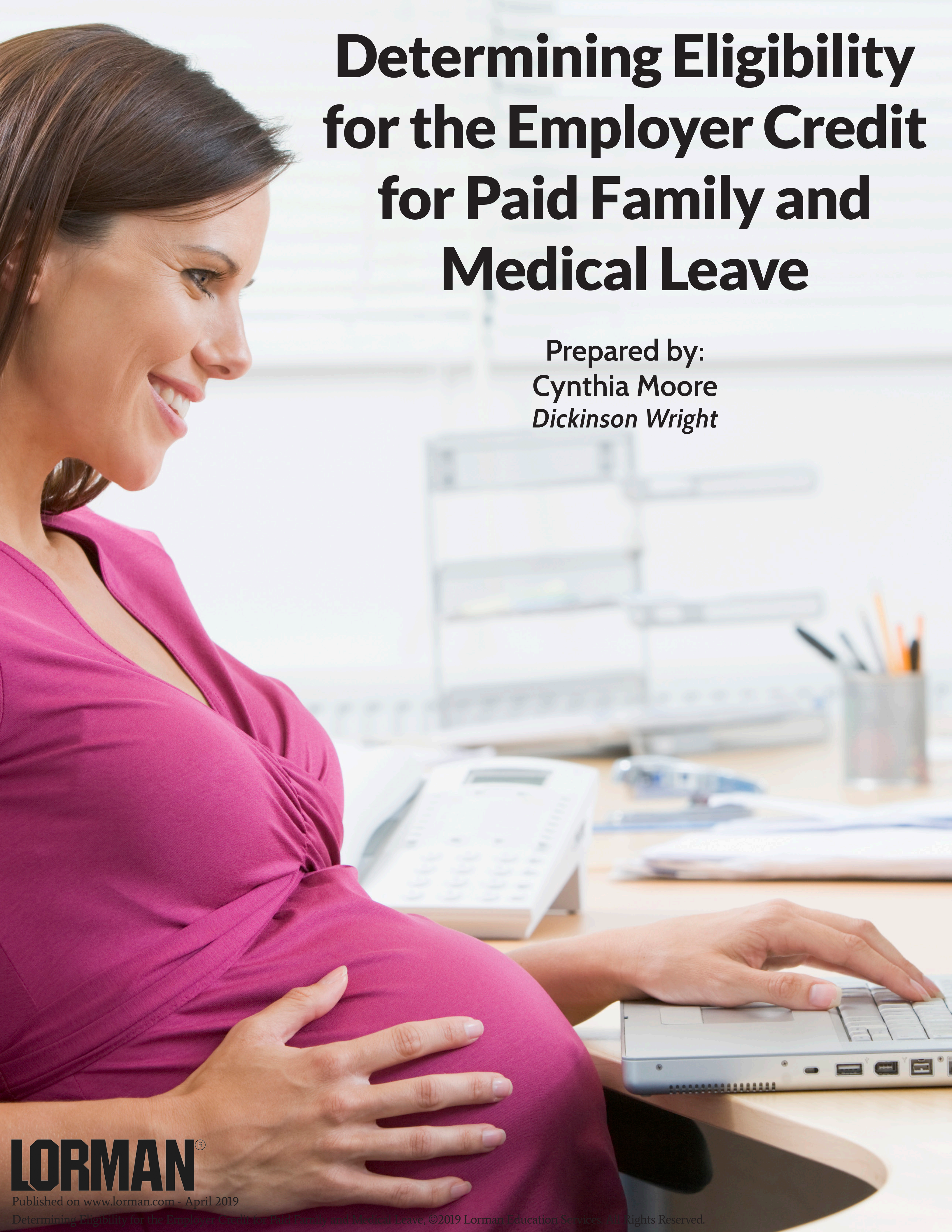

Determining Eligibility for the Employer Credit for Paid Family and Medical Leave

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Published on www.lorman.com - April 2019

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Written by Cyndi Moore | Jan 28, 2019

Section 45S of the Internal Revenue Code ("Code"), added to the Code by the Tax Cuts and Jobs Act of 2017, establishes a general business credit for an employer who provides paid family and medical leave to qualifying employees. The credit would partially offset the cost of the paid leave, however, it is available only for the 2018 and 2019 taxable years. To assist employers in determining whether they are eligible to claim the credit, the IRS provided guidance in Notice 2018-71, summarized below. The FAQs are also available at this link.

Calculating the Credit

The credit is generally equal to the applicable percentage of the wages paid to qualifying employees while on family and medical leave. The "applicable percentage" is 12.5% increased (but not above 25%) by 0.25 percentage points for each percentage point by which the rate of payment exceeds 50%. In evaluating the usefulness of the credit, employers should note that their deduction for wages and salaries is reduced by the amount of the credit. The required reduction in the deduction applies even if the credit cannot be taken in the applicable year and must be carried back or forward. Notice 2018-71 provides further details on how to calculate the credit.

The IRS has published Form 8994, which is used to claim the credit. Although only summary information is required on Form 8994 to claim the credit, employers are cautioned that they should keep separate records that support the amount of the credit including the name, social security number and wages paid to each qualifying employee, the applicable percentage and a copy of the written family and medical leave policy.

Written Policy

As a prerequisite to claiming the credit, the employer must have a written policy that provides all "qualifying employees" with at least two weeks of paid family and medical leave (pro-rated for part-time employees) at a rate of at least 50% of the employee's normal wages. The written policy may be in a single document or multiple documents.

If the employer employs at least one qualifying employee who is not covered by title I of the Family and Medical Leave Act ("FMLA") (for example, an employee who works less than 1,250 hours per year), the employer must include "non-interference" language in its policy. Sample non-interference language is: *"[Employer] will not interfere with, restrain or deny the exercise of, or the attempt to exercise, any right provided under this policy. [Employer] will not discharge, or in any other manner discriminate against, any individual for opposing any practice prohibited by this policy."*

For an employer’s first taxable year beginning after December 31, 2017, the written policy could be adopted with retroactive effect as long as retroactive leave payments were made by the last day of the taxable year. (December 31, 2018 for employers with a calendar year.) For subsequent taxable years, the written policy must be in place before the credit is taken. The policy is considered to be in place on the later of the policy’s adoption date or its effective date.

Therefore, if a calendar year employer determines in early 2019 that its current leave policy does not satisfy the IRS guidance, the employer can implement a new or updated policy and claim the credit on a prospective basis in 2019. The practical question is then whether to retain the policy when the credit expires at the end of the 2019 taxable year.

Family and Medical Leave

The types of leave eligible for the credit are leaves qualifying under the FMLA, typically for the birth or adoption of a child, the employee’s serious health condition, or caring for a spouse, child or parent with a serious health condition. The leave must be specifically designated for one or more FMLA purposes, may not be used for any other reason, and is not paid by a State or local government or required by State or local law. Thus:

- PTO days that can be used for sickness, vacation, or personal reasons will not qualify (because the leave can be used for reasons other than FMLA purposes); and

- To the extent paid leave is provided under State or local law, the federal credit cannot be claimed. Short-term disability leave can qualify, whether it is insured or self-insured, as long as it meets all other requirements of family and medical leave under Code Section 45S.

Qualifying Employee

A “qualifying employee” is one who has been employed for one year or more and whose compensation is less than 60% of the amount under Code Section 414(q)(1)(B)(i) ($72,000 in 2018 and $75,000 in 2019.) No classification of employees may be excluded and a pro-rata amount of leave must be provided to part-time employees (working fewer than 30 hours per week.) Therefore, a paid leave policy benefiting only full-time employees will not qualify for the federal credit.

If an employer is using payments from a short-term disability (STD) insurance policy to satisfy the paid leave obligation, the employer should review the policy to determine if it has any pre-existing condition exclusions. If so, according to IRS Notice 2018-71, the employer will not be eligible for the credit for any employee because a qualifying employee with a pre-existing condition would not receive payments from the policy. This deficiency can be cured if the employer provides payments on a self-insured basis to any qualifying employee who is not eligible for payments under the STD policy due to a pre-existing condition.

Effective Date

The credit applies to wages paid in taxable years beginning after December 31, 2017 and before January 1, 2020.

The credit is useful in encouraging an employer to provide paid family and medical leave to employees. However, its usefulness is limited as the credit expires at the end of the 2019 taxable year. If an employer wishes to take advantage of the credit, it should carefully review its existing leave policy and STD policy and determine if modifications are necessary.

About the Author:

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